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Attorney's fees and costs in FEHA cases

RECOVERY OF FEES AND COSTS, AND STATUTORY OFFERS TO COMPROMISE, IN FEHA CASES AFTER *WILLIAMS* AND THE 2019 STATUTORY AMENDMENT TO FEHA

In actions under the Fair Employment and Housing Act ("FEHA"), Government Code section 12965, subdivision (b) provides for the recovery of attorney's fees, costs, and expert-witness fees and overrides the standard cost-recovery provision that applies in civil actions generally, section 1032 of the Code of Civil Procedure.

For prevailing plaintiffs, attorney's fees, costs, and expert-witness fees are recoverable unless special circumstances would make the award unjust.

For prevailing defendants, however, none of these items are recoverable unless the court finds that the plaintiff's action was frivolous.

This is true notwithstanding any statutory offers to compromise made by the defendant under Code of Civil Procedure section 998. An amendment to section 12965, subdivision (b) that became effective on January 1, 2019, makes this clear.

In cases where there are both FEHA and non-FEHA claims to recover costs on the non-FEHA claims, the defendant must show that the sought-after costs were incurred solely in defending the non-FEHA claims. Otherwise, the rules above apply. (*Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040.)

Remaining questions include what role, if any, section 998 offers now have in FEHA actions. For example, can a section 998 offer still trigger interest under Civil Code section 3291 in FEHA harassment actions? Should a trial court adjust a plaintiff's requested cost, attorney's-fee, and expert-fee award downward if the plaintiff prevails at trial but fails to beat a defendant's pretrial section 998 offer (or other settlement offer given the inapplicability of 998 offers to adjust costs)? Is that a "special circumstance" that would make a full fee and cost award unjust? We await answers to these questions from the courts and the Legislature.

The default rule for ordinary costs, expert costs, and attorney's fees

The default rule in non-FEHA civil actions is that a prevailing party is entitled to recovery of certain ordinary costs as a matter of right. (§ 1032, subd. (b).)

Code of Civil Procedure section 1033.5, subdivision (a) lists those costs recoverable under section 1032, subdivision (b) as a matter of right (e.g., filing, motion, and jury fees; deposition costs; service-of-process costs; ordinary witness fees; etc.). Section 1033.5, subdivision (b) expressly prohibits the recovery of certain other costs (such as expert-witness fees, postage, private investigations, and more) "except when expressly authorized by law." Other costs not listed in subsections (a) or (b) may be awarded in the court's discretion. (*Id.*, § 1033.5, subd. (c)(4).)

Under section 1033.5, subdivision (a)(10), attorney's fees are recoverable as an item of costs only when authorized by contract, statute, or law. A number of labor-related statutes include such a provision, including section 12965, subdivision (b) and provisions dealing with wage-and-hour violations; the Equal Pay Act; PAGA claims, and others.

Finally, Code of Civil Procedure section 998 allows for either withholding or augmenting costs awards under section 1032 if the conditions of section 998 are met. If a settlement offer complying with section 998 (commonly referred to as a "998 offer") is made but not accepted, and if the offeree fails to obtain a "more favorable judgment or award," the offeree may be subject to certain adverse consequences, including cutting off the offeree's post-offer costs and awarding the offeror both post-offer costs and expert-witness fees. (*Id.*, § 998, subds. (c)-(e).)

Additionally, in tort actions to recover damages for personal injury, if a defendant fails to accept a 998 offer and the plaintiff obtains a more favorable judgment, under Civil Code section 3291, the defendant is also liable for interest on the personal-injury damages at ten percent per annum from the date of the offer. (Civ. Code, § 3291.)

Recovery in FEHA actions

The FEHA is a broad set of laws regulating employment in the state. Among other things, the FEHA prohibits certain forms of discrimination, harassment, and retaliation in employment, requires reasonable accommodation of physical and mental disabilities, requires employers (in some circumstances) to provide pregnancy disability leave and child-bonding leave.)

The FEHA contains its own provision regarding attorney's fees and costs, including expert-witness fees. In FEHA actions, the trial court, "in its discretion, may award to the prevailing party . . . reasonable attorney's fees and costs, including expert witness fees . . . ." (§ 12965, subd. (b).) As we'll see later, a

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recent amendment to the FEHA adds a significant clause to this section.

Leading up to 2015, section 12965, subdivision (b) was interpreted to allow recovery of attorney's fees by a prevailing employer defendant only where the plaintiff's case was frivolous. But regarding ordinary costs and expert-witness fees, employer defendants were able to threaten recovery of litigation costs against plaintiffs. This included the threat of recovery of expert-witness fees in the event of a rejected 998 offer.

The result? Plaintiffs in employment actions often substantially reduced their settlement positions because an adverse cost award would in many cases mean financial ruin.

This all changed in 2015.

Williams changes the landscape in 2015

Two key questions were decided in 2015 regarding costs in FEHA actions: (1) Does section 12965 subd. (b) or section 1032, subdivision (b) govern a party's entitlement to costs? (2) If section 12965, subdivision (b) governs, what is the discretionary standard for recovery of costs, and is the standard the same or different for prevailing plaintiffs versus prevailing defendants? The answers came in *Williams v. Chino Valley Independent Fire District* (2015) 61 Cal.4th 97 ("*Williams*"), a major opinion that changed the landscape in FEHA actions.

In *Williams,* the California Supreme Court held that section 12965, subdivision (b) is an express exception to the mandatory-cost-provision of section 1032, subdivision (b) and therefore governs costs awards in FEHA actions:

> We conclude Government Code section 12965(b) is an express exception to Code of Civil Procedure section 1032(b) and the former, rather than the latter, therefore governs costs awards in FEHA cases. The FEHA statute expressly directs the use of a different standard than the general costs statute: Costs that would be awarded as a matter of right to the prevailing party under Code of Civil Procedure section 1032(b) are instead awarded in the discretion of the trial court under Government Code section 12965(b). By making a cost award discretionary rather than mandatory, Government Code section 12965(b) expressly excepts FEHA actions from Code of Civil Procedure section 1032(b)'s mandate for a cost award to the prevailing party.

(*Id.* 61 Cal.4th at p. 105.)

The *Williams* court next turned to the discretionary standard that courts should apply in determining awards of costs under the FEHA. While Title VII makes costs awards mandatory, the FEHA differs from Title VII in making even ordinary costs discretionary. (*Id.* at 109.) And section 12965, subdivision (b) of the FEHA grants discretion to the trial court in awarding ordinary costs. So the *Williams* court had to address how that discretion should be exercised when a defendant is the prevailing party.

The Court held that, although the language of section 12965, subdivision (b) does not distinguish between awards to plaintiffs and defendants, its legislative history and underlying policy goals suggested that the Legislature intended that trial courts use an asymmetrical standard, first approved by the U.S. Supreme Court in Title VII actions in *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421-422. Under that standard, an employer should only be awarded attorney's fees in Title VII actions where the court finds that the plaintiff's action "was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith . . . or that the plaintiff continued to litigate after it clearly became so." (*Ibid*.)

Hence, the *Williams* court concluded that a prevailing *plaintiff* in FEHA actions should recover costs and attorney's fees, while a prevailing *defendant* should not be awarded costs or attorney's fees unless the trial court finds that the plaintiff's action was frivolous. (*Williams*, 61 Cal.4th at p. 115.)

This was a major change in the FEHA landscape. After *Williams*, FEHA plaintiffs no longer faced the threat of an adverse cost award. Employer defendants, on the other hand, felt increased pressure – given that there was less downside to FEHA plaintiffs, litigants faced a very different settlement dynamic in FEHA actions.

What about cases involving both FEHA and non-FEHA actions?

What happens when a defendant prevails in an action that includes both FEHA and non-FEHA claims? Answer: *Roman v. BRE Properties, Inc.*, 237 Cal.App.4th at pp 1049-1050, the defendant may only recover costs that were incurred solely in defending the non-FEHA claims (unless the plaintiff's claim was frivolous).

But costs incurred in defending non-FEHA claims that are intertwined and inseparable from FEHA claims must follow the *Williams* rule. (*Ibid*.) To hold otherwise "would weaken private enforcement of vital antidiscrimination and disability rights statutes, 'tend[ing] to discourage even potentially meritorious suits by plaintiffs with limited financial resources' [citation] to compel an award of costs under section 1032, subdivision (b), simply because the plaintiff, based on the same alleged misconduct, had pleaded other civil rights theories in addition to his or her FEHA causes of action.'" (*Ibid.*)

What about recovery for prevailing individual, non-employer defendants?

Does the *Williams* rule apply to prevailing individual defendants in FEHA actions? Yes. (*Lopez v. Routt* (2017) 17 Cal.App.5th 1006, 1014-1016.) *Lopez* rejected a claim that the *Williams* rule applies only to prevailing employer defendants and not to individual defendants in FEHA actions.

998 offers

Sviridov v. City of San Diego

Sviridov v. City of San Diego (2017) 14 Cal.App.5th 514 was the first post-*Williams* case tackling the issue of statutory offers to compromise in the aftermath of *Williams*. There the plaintiff rejected three different 998 offers offering a cost waiver in exchange for a dismissal, and then the defendants prevailed in a bench

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trial. The trial court awarded the defendants over $90,000 in costs but did not find that the plaintiff's claim was frivolous.

The Court of Appeal affirmed the award, concluding that section 998, like section 12965, subdivision (b) operated as an exception to section 1032. And the court concluded that section 998 should control over section 12965, subdivision (b), because to hold otherwise would be contrary to the goal of section 998 in encouraging settlement. (*Id.,* 14 Cal.App.5th at p. 521 ["[A] blanket application of *Williams* to preclude section 998 costs unless the FEHA claim was objectively groundless would erode the public policy of encouraging settlement in such cases."].)

This outcome sent a bit of a shockwave through the employment bar. Had it remained good law, nothing would prevent FEHA defendants from making 998 offers for zero dollars in every case (subject to the ordinary 998 requirements, which are beyond the scope of this article). In the event of a defense verdict, the plaintiff would be hit with an adverse cost award, nullifying the *Williams* rule.

Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.

Less than six months after *Sviridov,* the court in *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (2018) 19 Cal.App.5th 525, declined to follow *Sviridov*. In *Arave*, the plaintiff brought a FEHA action for discrimination, harassment, and retaliation and other claims premised on his religious affiliation, as well as claims for nonpayment of wages and for whistleblower retaliation under Labor Code section 1102.5. (*Arave*, 19 Cal.App.5th at 529.) Before trial, the defendant issued a 998 offer in the amount of $100,000 plus attorney's fees and costs for payment on the cause of action for nonpayment of wages and related penalties only, plus a dismissal with prejudice of the entire action. (*Id.* at 548-549.) In other words, this was the equivalent of the defendant offering a monetary amount (plus costs and attorney's fees) on the non-FEHA wage claim, and for zero dollars on the FEHA claims.

The trial ended in a defense verdict, and the trial court imposed a large cost, expert-fee, and attorney's-fee award for prevailing on the wage claim under former Labor Code section 218.5 (which allowed prevailing-party fee awards in certain wage actions) and for the plaintiff failing to beat the defendant's 998 offer. (See *id.* at 529-530, 544.) The trial court denied the defendants' request for attorney's fees on the FEHA claims, ruling that the claims were not frivolous. (*Id.* at 533.) This resulted in denying most of the defendants' requested attorney's fees of over $1.2 million and awarding only a smaller portion for the defense of the wage claims. (See *id.* at 544.)

Both parties appealed. On appeal, the parties agreed that the trial court used the wrong standard in awarding attorney's fees under former Labor Code section 218.5, which had been amended with new statutory language, effective before the trial court's fee award, that prohibited awarding attorney's fees to a prevailing employer unless the court finds that "the employee brought the action in bad faith." (*Id.* at 545.) Because the trial court did not make a finding of bad faith, the *Arave* court reversed and remanded for a determination under the correct standard.

Turning to the denial of the requested attorney's fees for defense of the FEHA claims, the *Arave* court first found no abuse of discretion in finding that the plaintiff's claim was not frivolous, thereby affirming the denial of attorney's fees. (See *Id.* at 545-547.)

The parties also agreed that the trial court erred in awarding ordinary costs as a matter of right under section 1032. Since the trial court ruled that the FEHA claims were not frivolous, the defendants were not entitled to recover ordinary costs incurred in defending the FEHA claims, although they were not precluded from obtaining ordinary costs in defending the wage claim. (*Id.* at 548.) The *Arave* court reversed and remanded for the trial court to differentiate between costs incurred on the FEHA versus wage claims. (*Ibid.*)

Finally, the *Arave* court turned to the award of expert-witness fees. The plaintiff contended that the trial court erred in awarding expert fees under section 998 because section 998 is in conflict with FEHA section 12965, subdivision (b), and the trial court already found that the plaintiff's claim was not frivolous. (*Ibid.*)

The *Arave* court agreed, holding that the *Williams* rule applies to expert fees, notwithstanding any 998 offer – expert fees may only be awarded to a prevailing defendant if the trial court finds that the plaintiff's claim was frivolous. (*Id.* at p. 550.)

Huerta v. Kava Holdings, Inc.

In *Huerta v. Kava Holdings, Inc.* (2018) 29 Cal.App.5th 74, plaintiff went to trial on FEHA claims of harassment, discrimination, and failure to prevent harassment and/or discrimination, and the jury returned a defense verdict on all claims. Post-judgment, the trial court found that the plaintiff's claim was not frivolous and denied the defendant's motion for attorney's fees, expert fees, and costs under FEHA section 12965, subdivision (b). But the trial court awarded $50,000 in ordinary costs and expert-witness fees incurred after the date of defendant's 998 offer, which the plaintiff had rejected. The trial court's award included a reduction of the amount sought for ordinary costs and expert-witness fees to reflect the plaintiff's limited economic resources.

On appeal, the court adopted the *Arave* approach, and concluded that all three categories of costs, whether ordinary costs, attorney's fees, or expert-witness fees, are subject to the *Williams* rule regardless of whether the plaintiff rejected a 998 offer and failed to beat it. (*Id*., 29 Cal.App.5th at p. 84.)

The Legislature amends section 12965, subdivision (b) to codify the holding in *Williams*

On September 30, 2018, the Governor signed Senate Bill 1300, which made numerous revisions to the FEHA. Relevant here, the new provisions included an amendment to section 12965, subdivision (b), effective on January 1, 2019 that states:

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> In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees, *except that, notwithstanding Section 998 of the Code of Civil Procedure, a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so*.

(Govt. Code, § 12965, subd. (b) (italics added).)

This language effectively codified the *Williams* rule, incorporated the holdings of *Arave* and *Huerta* with regard to 998 offers, and abrogated the holding in *Sviridov*.

The rule now, and remaining questions

There should now be no question regarding the recovery of ordinary costs, attorney's fees, and expert-witness fees in FEHA actions:

First, a prevailing plaintiff is entitled to recovery of costs, attorney's fees, and expert-witness fees under section 12965, subdivision (b), unless special circumstances would make the award unjust. Second, a prevailing defendant is not entitled to recovery of any of these items unless the court finds that the plaintiff's claim was frivolous, notwithstanding any 998 offer.

Some questions remain. What if a plaintiff prevails at trial but fails to beat the defendant's 998 offer (if made), or otherwise rejects a pretrial settlement offer and fails to do better at trial? Under *Williams*, *Arave*, and the revised section 12965, subdivision (b) and its legislative history, the result is clear that 998 offers alone cannot be used to impose an adverse cost award. But, can the fact that the plaintiff could have settled well before trial be used as a key factor in the trial court exercising its discretion to award far less than the full amount of costs and fees requested as a "special circumstance[] [that] would render such an award unjust" (*Williams*, 61 Cal.4th at 115)? What other "special circumstances" would affect such an award? Stay tuned.

Another question: what are special circumstances that make the award unjust? Although examples in the case law come before the statutory amendment, one such potential "special circumstance" might be where a plaintiff fails to file the action in the limited civil courts and then fails to recover an amount in excess of the limited jurisdiction cap, i.e., $25,000. (See *Williams*, 61 Cal.4th at 107-108, quoting *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 986 ["[T]he plaintiff's failure to take advantage of the time- and cost-saving features of the limited civil case procedures may be considered a special circumstance that would render a fee award unjust."].) What circumstances a court might consider now remain to be seen.

And finally, what about the use of 998 offers by plaintiffs to trigger Civil Code section 3291 and secure post-offer interest on FEHA harassment claims? In *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, the court held that a FEHA sexual-harassment action constituted an action for "personal injury" under Civil Code section 3291. (*Id.*, 13 Cal.App.4th at 1001-02, 1004; see also *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 657 [damages for emotional distress sought in a negligence and intentional-infliction-of-emotional-distress action constituted "personal injury" under section 3291, citing *Bihun* with approval, but abrogating *Bihun* and other cases to the extent they hold that prejudgment interest under section 3291 may be awarded on punitive damages].)

Under the new statutory amendment and the holdings of *Williams* and *Arave* that section 998 is overridden by FEHA section 12965, subdivision (b), does the ability to claim interest in personal-injury actions still apply to FEHA harassment actions?

We don't have the answer yet. It may be that the FEHA is the sole governing statutory scheme with regard to remedies for FEHA claims. Or it may be that while section 998 cannot govern the award and adjustment of *costs* in FEHA actions (since costs are now solely governed by FEHA section 12965, subd. (b)), there may be no affect on use of 998 offers to trigger the separate interest provision of Civil Code section 3291. And the purpose of section 3291 seems to pose no conflict with the intent of the FEHA. (See, e.g., *Lakin*, 6 Cal.4th at 663-664 [purpose of section 3291 is to encourage settlements and to make the plaintiff whole as of the date of the injury, including by compensating for the loss of use of the personal-injury damages during the prejudgment period].)

We'll have to wait to see what happens. But this may be a reason that plaintiffs may still want to make 998 offers in FEHA harassment cases. Even if 998 offers cannot trigger costs adjustments in FEHA actions, they may still trigger prejudgment interest in FEHA harassment actions. Stay tuned.

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